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Before the
Federal Communications Commission
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Implementation of Sections)
3(n) and 332 of the)
Communications Act; Regulatory)
Treatment of Mobile Services)

GEN Docket No. 93-252

To: The Commission

COMMENTS OF IN-FLIGHT PHONE CORPORATION

In-Flight Phone Corp., a licensee in the 800 MHz air-ground radiotelephone service, requests in these Comments that the Commission, in accordance with Section 332(c)(1) of the Communications Act, exempt air-ground licensees from mandatory compliance with certain provisions in Title II of the Act as described below.^{1/} The FCC initiated this proceeding in order to implement Section 332(c)(1).

DISCUSSION

Section 332(c)(1)(A) authorizes the Commission to exempt a "commercial mobile service" from the duty to comply with any provision in Title II (other than Sections 201, 202, and 208) upon making three specific findings, as follows:

"(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

^{1/} The 800 MHz air-ground radiotelephone service is regulated under Section 22.1100 et seq. of the Commission's Rules.

(iii) [waiving enforcement of] such provision is consistent with the public interest."

In determining whether an exemption from mandatory compliance with a specific provision of Title II is consistent with the "public interest", Section 332(c)(1)(C) requires the Commission to consider whether the exemption will "promote competitive market conditions."

800 MHz air-ground service is a "commercial mobile service" within the meaning of Section 332. Section 332(d)(1) states that "commercial mobile service" includes "any mobile service . . . that is provided for profit and makes interconnected service available" 800 MHz air-ground radiotelephone service fits this definition squarely since the service is provided on a for-profit basis and makes interconnected service available by permitting airline passengers to originate regular telephone calls to any telephone in the world while in flight.

In-Flight urges the Commission to take three specific actions in this proceeding directly affecting those who provide 800 MHz air-ground service. Each is discussed below.

First, the agency should exempt those air-ground service providers who have no substantial affiliation with a "dominant carrier" from the obligation to comply with 12 sections of Title II that regulate the conduct of those with market power because enforcement of these provisions is not necessary to meet any of the three objectives set forth in Section 332(c)(1).^{2/} Enforcing these

^{2/} These 12 sections are as follows: Section 203 (requiring carriers to file tariffs), Section 204 (authorizing Commission to suspend carrier tariffs pending a hearing on lawfulness), Section 205 (authorizing Commission to prescribe rates), Section 211, 205 (authorizing Commission to prescribe rates), Section 211, (continued...)

sections of the Act against such air-ground carriers plainly is unnecessary "to ensure that the charges, practices, classifications, or regulations for or in connection with [air-ground service] are just and reasonable" (Section 332(c)(1)(A)(i)) because the air-ground market is intensely competitive, and thus marketplace forces themselves will ensure that charges and other practices are reasonable. Indeed, the FCC itself found in establishing rules to govern 800 MHz air-ground service that each air-ground service provider would face substantial competition from other air-ground service providers, and it found that airlines also would have an independent competitive interest to ensure that air-ground service is offered to their passengers on reasonable terms.^{3/} The Commission's projections were accurate. Three 800 MHz air-ground licensees operate nationwide air-ground networks today, and none of these three licensees has a dominant market position in the air-ground market. Moreover, the agency has awarded licenses to construct three additional nationwide

^{2/} (...continued)
(requiring certain carrier contracts to be filed), Section 212 (prohibiting interlocking directorates), Section 213 (authorizing Commission to value carrier property), Section 214 (requiring Commission to approve an extension of carrier lines), Section 215 (requiring Commission to examine certain intracorporate carrier transactions), Section 218 (authorizing Commission to obtain any information relating to carrier's business), Section 219 (authorizing Commission to require certain annual reports from carriers), Section 220 (authorizing Commission to prescribe accounting and recordkeeping methodology for carriers), and Section 221 (requiring Commission to follow certain procedures in approving carrier mergers and other acquisitions).

^{3/} Report and Order in GEN Dkt. No. 88-96, 5 FCC Rcd. 3861, 3865 (1990), recon. denied, 6 FCC Rcd. 4582 (1991).

networks.^{4/} Since 800 MHz air-ground service is a competitive market, enforcement of these 12 provisions likewise is not necessary for the "protection of consumers" (Section 332(c)(1)(A)(ii)) because marketplace forces will provide the consumer protection that these sections of Title II were designed to provide. Finally, waiving enforcement of these provisions "is consistent with the public interest" (Section 332(c)(1)(A)(iii)) since it "will promote competitive market conditions" by relieving air-ground service providers of the burdensome obligation to comply with unnecessary regulations and by relieving the Commission of the wasteful administrative duty to enforce provisions of the Act whose enforcement serves no purpose.

Second, although the 800 MHz air-ground market is competitive, an air-ground service provider affiliated with a dominant carrier should remain subject to existing FCC regulations governing competitive communications services provided by such dominant carriers; this will help ensure that a dominant carrier does not unfairly use its market power in other markets to harm competition in the air-ground market.^{5/} If the Commission wants to consider eliminating existing regulatory requirements applicable to

^{4/} Existing 800 MHz air-ground networks are operated by In-Flight, GTE Airfone, and Claircom Communications Group. The FCC has awarded licenses to Mobile Telecommunications Technologies Corp., American Skycell Corp., and Jet-Tel for the operation of three other nationwide 800 MHz air-ground networks.

^{5/} See, e.g., Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd. 2873, 3033-37 and 3051-53 (1989) (requiring AT&T, a dominant carrier, to file tariffs pursuant to Section 203 of the Act setting forth terms and conditions under which it provides communications services in competitive markets).

competitive commercial mobile services offered by a dominant carrier, it should issue a separate Notice dealing solely with this subject since the agency has recognized that defining a new regulatory structure to govern competitive services offered by dominant carriers involves "intricate factual and definitional judgments. . . ."^{6/}

Third, the Commission should exempt all air-ground licensees from the obligation to comply with Section 226 which imposes a variety of regulatory requirements on an "aggregator" providing interstate telephone services at one or more "aggregator" locations. The Common Carrier Bureau has ruled that an air-ground licensee is an "aggregator" within the meaning of Section 226. Declaratory Ruling, DA 93-1022 (rel. Aug. 27, 1993). The Bureau presently is considering a petition for reconsideration of the Declaratory Ruling which requests reversal of the Bureau's finding that an air-ground licensee is an "aggregator".^{7/} While the Bureau should reverse this finding for the reasons set forth in the petition, the Commission can achieve the same result in the present proceeding pursuant to Section 332(c)(1) of the Act by exempting

^{6/} Id., 4 FCC Rcd. at 3035-36. The Commission also should state clearly in the order terminating the present proceeding that a dominant carrier providing 800 MHz air-ground service through an entity in which it has a substantial interest will be subject to existing regulatory policies governing the provision of competitive services by that dominant carrier. For example, if dominant carrier AT&T acquires McCaw Communications as planned, existing regulatory policies governing competitive services offered by AT&T should apply to Claircom's 800 MHz air-ground service because AT&T would have a 51 percent equity interest in Claircom upon acquiring McCaw.

^{7/} "Pet. for Recon. or Waiver" filed by GTE Service Corp. (MSD-92-14, Sept. 27, 1993).

800 MHz air-ground licensees from the obligation to comply with Section 226. It would be appropriate for the Commission to grant this exemption because enforcement of Section 226 is not necessary to meet any of the three objectives set forth in Section 332(c)(1). In-Flight explained in detail why enforcement of Section 226 is not necessary to meet these objectives in comments supporting the pending petition for reconsideration, and it incorporates that explanation into the present Comments. A copy of the In-Flight comments in support of the pending petition for reconsideration is attached for easy reference.

CONCLUSION

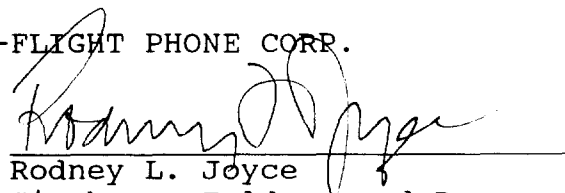
For the reasons set forth above, the Commission should exempt those 800 MHz air-ground licensees who have no substantial affiliation with a dominant carrier from Sections 203, 204, 205, 211, 212, 213, 214, 215, 218, 219, 220, and 221 of the

Communications Act; and it should exempt all 800 MHz air-ground licensees from Section 226 of the Act.

Respectfully submitted,

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